

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION NO. 2:05-00251-01

ROBERT D. MILLER

MEMORANDUM OPINION AND ORDER

Pending is defendant's motion to modify sentence, filed March 12, 2008, pursuant to 18 U.S.C. § 3582(c)(2). The motion to modify sentence is based upon the November 1, 2007, amendment to U.S.S.G. § 2D1.1, which the United States Sentencing Commission made retroactive effective March 3, 2008.

On February 29, 2008, the court, sua sponte, entered an order reducing defendant's sentence from 70 to 57 months. The order, effective March 3, 2008, accorded defendant the full benefit of the retroactive section 2D1.1 amendment. The court, accordingly, ORDERS that defendant's motion to modify sentence be, and it hereby is, denied as moot.

To the extent defendant seeks a departure or variance sentence below the reduced 57 month sentence, the court ORDERS that the request be, and it hereby is, denied. See U.S.S.G. § 1B1.10(a)(3) ("Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant."); U.S.S.G. § 1B1.10(b)(1) ("the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that

were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected."); United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000) ("A motion pursuant to § 3582(c) 'is not a do-over of an original sentencing proceeding where a defendant is cloaked in rights mandated by statutory law and the Constitution.'").

The Clerk is DIRECTED to send a copy of this order to the defendant, the United States Attorney, and the United States Probation Office, and the Federal Public Defender.

ENTER: March 21, 2008


John T. Copenhaver, Jr.
United States District Judge